

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

TENTATIVE ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2010-0535

MANDATORY PENALTY
IN THE MATTER OF

EDDIE DUANE SMITH TRUST
MADERA TRANSPORTATION
305 NORTH 'E' STREET
MADERA, MADERA COUNTY

This Order is issued to The Eddie Duane Smith Trust (hereafter Discharger) pursuant to California Water Code (CWC) section 13350, which authorizes the imposition of Administrative Civil Liability (ACL), and CWC section 13323, which authorizes the Executive Officer to issue this Order. This Order is based on findings that the Discharger violated provisions of Cleanup and Abatement Order R5-2007-0726

The Executive Officer of the Central Valley Regional Water Quality Control Board ("Central Valley Water Board" or "Board") finds the following:

1. On 19 September 2007, the Executive Officer of the Central Valley Water Board issued Cleanup and Abatement Order R5-2007-0726 (the "Cleanup Order") to the Eddie Duane Smith Trust, the Mildred R. Smith Trust, and Miguel P. Gonzalez, pursuant to CWC section 13304. The Cleanup Order required the investigation and cleanup of a release of petroleum hydrocarbon constituents. The release, which was first reported in July 1996, occurred from one underground storage tank (UST) at Madera Transportation, 305 North E Street, Madera, California, APN# 007-075-008 (the "Site"). Specifically, the Cleanup Order required the submittal of a Water Supply Well Survey and a Site Assessment Workplan (the "Workplan") by 26 November 2007, and a Site Assessment Report summarizing the investigation performed in accordance with the approved Workplan by 26 March 2008.
2. On 23 March 2009, the Executive Officer of the Central Valley Water Board issued ACL Complaint R5-2009-0512 to the Eddie Duane Smith Trust (the "Trust") after the Trust failed to comply with the directives contained in the Cleanup Order.
3. Subsequent to the issuance of the ACL Complaint, Mr. Eddie Smith (representing the Trust) came in to the Central Valley Water Board's offices in order to settle the Complaint and to understand his responsibility under the Cleanup Order.
4. Mr. Smith eventually submitted the past-due Workplan on 15 May 2009, and the Water Supply Well Survey and the Site Assessment Report on 19 October 2009.
5. CWC section 13350 states, in relevant part:
 - (a) Any person who (1) violates any cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board... shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).

...

(e) The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not both.

(1) The civil liability on a daily basis may not exceed five thousand dollars (\$5,000) for each day the violation occurs.

...

(B) When there is no discharge, but an order issued by the regional board is violated, except as provided in subdivision (f), the civil liability shall not be less than one hundred dollars (\$100) for each day in which the violation occurs.

...

(f) A regional board may not administratively impose civil liability in accordance with paragraph (1) of subdivision (e) in an amount less than the minimum amount specified, unless the regional board makes express findings setting forth the reasons for its action based upon specific factors required to be considered pursuant to Section 13327.

Pursuant to the State Water Board's Order in *Zoecon Corporation* (Water Quality Order 86-2), the passive migration of pollutants from a landowner's property constitutes a "discharge" within the meaning of the California Water Code. However, testing at the Site performed subsequent to the issuance of the ACL Complaint found no passive migration of pollutants, and hence, no "discharge" for the purposes of calculating liability pursuant to CWC section 13350. Nonetheless, the Trust still has incurred liability by its failure to submit the required reports by the deadlines contained in the Cleanup Order. This ACL Order resolves this outstanding liability.

6. The Trust has accrued liability for violating the following provisions of the Cleanup Order:
 - a. Required Action 2, Submittal of Well Survey by 26 November 2007: 693 days late;
 - b. Required Action 5, Submittal of the Workplan by 26 November 2007: 536 days late;
 - c. Required Action 6, Submittal of the Site Assessment Report by 26 March 2008: 570 days late.

The Trust has accrued 1,799 days of violations for failing to perform separate and distinct required actions under the Cleanup Order. Based on a statutory maximum penalty of \$5,000 per day per violation, the maximum liability for these 1,799 violations is eight million, nine hundred and ninety-five thousand dollars (\$8,995,000). Absent the Central Valley Water Board making express findings under CWC section 13350(f), the minimum liability under CWC section 13350 is one hundred seventy-nine thousand nine hundred dollars (\$179,900), calculated at \$100 per day per violation, multiplied by 1,799 days of violations.

7. CWC section 13327 states:

In determining the amount of civil liability, the regional board . . . shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.

The following is a discussion of the factors recited in CWC section 13327. Please note that the State Water Board's current Water Quality Enforcement Policy, approved by the State Office of Administrative Law on 20 May 2010, uses a different methodology to arrive at penalty assessments in ACL Orders. However, ACL Complaint R5-2009-0512 was issued prior to the adoption of this policy, and settlement negotiations were largely concluded by the time the current Water Quality Enforcement Policy came into effect. Therefore, this Order is not required to follow the calculation methodology in the current Water Quality Enforcement Policy, and instead utilizes metrics from the Enforcement Policy that was in effect at the time the Complaint was issued.

- a. Nature and Circumstances of the Violation: The Trust incurred liability solely through the late submittal of reports required in the Cleanup Order.
 - b. Extent and Gravity of the Violations: Though the reports were submitted very late, the results showed that the initial release no longer posed a threat to water quality.
 - c. Whether the discharge is susceptible to cleanup or abatement: The discharge does not require any advanced treatment.
 - d. Degree of Toxicity: Though the initial discharge consisted of petroleum hydrocarbons, the release did not pose a threat by the time the Cleanup Order was issued.
 - e. Ability to Pay: Eddie Duane Smith submitted documents showing that he is retired and on a fixed income. His income for 2008 was \$61,156.
 - f. Effect on Ability to Continue in Business: n/a
 - g. Voluntary Cleanup Efforts Undertaken: n/a
 - h. Prior History of Violations: There was no prior history of violations.
 - i. Degree of Culpability: Though the Trust did not purposely acquire the Site, and instead acquired it through the passing of Mildred R. Smith (Eddie Duane Smith was the successor trustee of the Mildred R. Smith Trust), the Trust was primarily responsible for the delays.
 - j. Economic Benefit or Savings: The economic benefit is minimal, equal to the deferred costs of the investigation.
 - k. Other factors as justice may require: Eddie Duane Smith performed the investigation required by the Order and found the release at the Site does not threaten public health or the environment.
8. Based Finding 7, issuance of an ACL Order imposing liability in an amount equal to the Board's staff costs is justified. Staff spent 75 hours on this project. At an hourly rate of \$150 per hour, staff costs are \$11,250.
 9. On 15 March 2007, the Central Valley Water Board explicitly delegated to the Executive Officer the authority to issue orders to assess administrative civil liability where the matter is not contested by the discharger (Resolution R5-2007-0009).
 10. This Order constitutes a settlement of the violations herein mentioned. Notice of this settlement was published on the Central Valley Water Board's website for 30 days, and no adverse comments were received.

11. Issuance of this Administrative Civil Liability Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321.

IT IS HEREBY ORDERED, pursuant to California Water Code section 13350, that:

1. The Eddie Duane Smith Trust shall be assessed Administrative Civil Liability in the amount of **eleven thousand two hundred fifty dollars (\$11,250)**.
2. The Eddie Duane Smith trust shall submit payment according to the payment schedule in Attachment A.
3. This Order is effective upon the date of signature.

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday (including mandatory furlough days), the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at:

http://www.waterboards.ca.gov/public_notices/petitions/water_quality

or will be provided upon request.

Kenneth Landau, Assistant Executive Officer

Date

Attachment A: Payment Agreement